92-393

Supreme Court, U.S.
FILED
AUG 5 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. _____

MARIA DEL ROSARIO C. FRAIRE,
Individually and as Next Friend for
MYRA FRAIRE and JUAN ANTONIO FRAIRE,
Minor Children, and
JOSEFA ESQUIVEL FRAIRE, Petitioners
v.
CITY OF ARLINGTON and
JAMES W. LOWERY, JR., Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

APPENDIX A

Opinion of the United States
Court of Appeals for the Fifth Circuit
of April 10, 1992

APPENDIX A

Maria Del Rosario C. Fraire, Individually and as Next Friend for Myra Fraire and Juan Antonio Fraire, Minor Children, and Josefa Esquivel Fraire, Plaintiffs-Appellants

v.

City of Arlington and James W. Lowery, Jr., Defendants-Appellees

No. 91-1597
Summary Calendar

United States Court of Appeals,
Fifth Circuit.

April 10, 1992
Rehearing Denied May 7, 1992

Argued before JONES, DUHE, and WIENER, Circuit Judges.

WEINER, Circuit Judge:

In this 42 USC Section 1983 action, the Plaintiffs-Appellants, successors of the late Javier Fraire (Fraire), appeal from the decision of the district court dismissing their claims against Defendants-Appellees, police officer James W. Lowery,

Jr. (Lowery) and the City of Arlington, Texas (Arlington), for Lowery's alleged use of unconstitutionally excessive force in the shooting death of Fraire. Agreeing with the district court that Lowery was qualifiedly immune, and that the Plaintiffs failed to plead their claims against Arlington with sufficient particularity or to present summary judgment evidence to place material facts in issue, we affirm.

I.

FACTS AND PROCEEDINGS

Almost all excessive force cases are very fact intensive; this one is certainly no exception. And, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact. Our decision today is not dependent on the resolution of those discrepancies.

We do, however, acknowledge our duty in the context of summary judgment, to view the facts in the light most favorable to the nonmovants - here the Plaintiffs. Moreover, when there are discrepancies between versions of the facts, we shall note them.

A. Operable Facts

Early on a Sunday afternoon, Lowery, a warrants officer for the Arlington police department, was driving on a major road in that city. He was driving an unmarked police car and was dressed in plain clothes.

In front of Lowery, a pickup truck turned onto the road from the parking lot of a convenience store on the east side of the street. As the pickup entered the thoroughfare, it made an extremely wide right turn, swinging into the inside lane,

and nearly colliding with oncoming traffic. Someone (not Lowery) honked at the pickup, in response to which the driver stuck his hand out of the window and made a "familiar gesture." Their truck was traveling in the same direction as Lowery, who noticed that each of its two occupants, both male, held an open can of beer in his hand.[1] The driver was Fraire and the passenger was Jose Rodriguez. Lowery followed the pickup for about one-half mile. He observed that Fraire failed to maintain a single lane of traffic, often swerving into other lanes. Lowery called his dispatcher, provided a description of the truck and its license number, and requested that a marked patrol car stop the truck.

---

[1] Tex.Rev.Civ.Stat.Ann. art 6701d, Section Section 107E (Vernon supp. 1991) prohibits drinking and driving.

Just as Lowery completed his first radio request for assistance, Fraire made a sudden right turn off the main road onto a residential street, then turned immediately into the driveway of the first residence and stopped without any prompting from Lowery. Following Fraire onto the side street, Lowery stopped across the street. As Rodriguez told the police in an interview he gave shortly after the incident, Fraire stopped in the driveway in an attempt to trick Lowery into believing that Fraire was going into the garage of the house where they had stopped. Lowery advised his dispatcher of the location where he and the suspects had stopped and that he intended to speak with the occupants of the truck.

Lowery states that at that point he removed his badge from his belt, placed it face open in his hand, and showed it to Fraire and Rodriguez. He also orally identified himself as a police officer and then approached the truck. As Lowery reached the passenger's side of the truck, he reidentified himself as a police officer. Lowery saw that Fraire had an open can of beer, which he then put on the floor. Lowery identified himself for a third time as a police officer and told Fraire to put the truck in park and turn off the ignition. Fraire then stated, "I am sorry, I didn't mean to do it. It won't happen again, I promise." Lowery repeated his request for Fraire to park the truck and turn off the ignition. Instead, Fraire put the truck in reverse and backed it out of the driveway. Rodriguez denied that

this conversation ever took place.[2]

Faire sped down the side street into the residential neighborhood. Lowery returned to his car, and radioed the dispatcher again. Believing that the side street was a dead end, Lowery followed Fraire slowly. As he drove, Lowery continued to advise the dispatcher of his location. Fraire continued to pull away from Lowery and when the truck rounded the crest of a small hill, Lowery momentarily lost sight of it. Rodriguez recalled that about this time Fraire turned to Rodriguez and admitted that he had had legal problems with a "DWI."[3] Fraire asked Rodriguez to

---

[2] Police dispatch records indicate that less than 30 seconds elapsed between the time that Lowery radioed that he had stopped to the time that he radioed that he was on the move again.

[3] Fraire was on probation for a prior conviction for driving while intoxicated. When Rodriguez was questioned

drive the pickup, which Rodriguez declined to do.

Seconds later, Lowery's car reached the top of the small hill, just in time for Lowery to see that Fraire, who was now driving so fast that he could not negotiate the turn at the bottom of the hill, had slammed the truck against the curb and skidded several feet up onto a lawn. As Rodriguez told police immediately after the incident, once the truck had stopped on the lawn, "I also recall that he [Fraire] was scared and he told me to throw a beer

---

by the police investigators following the accident, he was asked whether Fraire knew that Lowery was a police officer. Rodriguez responded, "I think so because in the manner he was scared." Later, when asked how Fraire knew that Lowery was an officer, Rodriguez said, "I really don't know maybe because of the vehicle." In his affidavit, Rodriguez claimed not to have known that Lowery was a police officer until after the shooting occurred.

away."

Lowery believed that the truck had wrecked and so advised his dispatcher. But when Lowery was only about 50 feet away from where the truck was stopped, Fraire put the truck in reverse and backed toward Lowery's car, nearly ramming it. Again, Fraire sped off.

Lowery followed Fraire down the residential street to its intersection with a cul-de-sac. Fraire turned. Just as Lowery reached the intersection, Fraire, who had apparently not realized that the cul-de-sac was a dead end, skidded to a stop, again striking the curb and causing the truck to die. Lowery slowly pulled into the cul-de-sac and parked his car about 25 to 30 feet away from Fraire a few feet away from the left side of the curb without, however, blocking the entrance to

the street with his car.

After advising the dispatcher of his new location, Lowery left his car on foot and walked around to the passenger side. Lowery says that he pulled his badge and held it up in his left hand, face open, so that it was visible to Fraire and Rodriguez and yet again identified himself as a police officer. A number of eye-witnesses recalled Lowery's oral identification, though none saw him display his badge. Rodriguez claims that he never saw Lowery display a badge and that he did not know Lowery was a police officer until after the incident. Nevertheless, Fraire re-started the truck and began to drive away.

Lowery stated that after yelling, "Stop, Police Officer" or essentially identical words several times, and seeing that Fraire was indeed not stopping as he

continued around the cul-de-sac, Lowery retreated to the relative safety of the rear of his car. But witnesses on the scene place him several feet away from his car, toward the middle of the street. Lowery insists that he was not blocking the entrance of the cul-de-sac, and that it would not have been difficult for Fraire to drive past him.

The following passage is an eye-witness description of what transpired next:

> He [Lowery] was standing about ten feet or so away from the passenger side of his detective car. By this time the truck had gone to the end of the court and had turned back around heading toward the detective. The truck was still going fast and squealing its tires. The truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. I saw the detective shout "hault" (sic). I couldn't hear what else the detective might have said for the noise of the truck and the squealing of the tires of the truck. The detective didn't shoot at first. He stood there for a while with his gun pointed at the

> truck while the truck was still headed right for the detective at a fast speed. The truck got closer and closer to the detective and the detective shot his gun one time at the truck when the truck was about ten or fifteen feet away from the detective. The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective. After the detective shot at the truck, the truck lost control and changed directions so that the truck didn't run over the detective. The truck jumped a curb and went up into somebody's yard and hit a tree and stopped.

Several other witnesses to the incident recalled that Lowery yelled "Stop, police," or "Halt, police," several times, that the truck headed straight for him such that they believed he was going to be run over, and that Lowery waited until the last possible moment before he pulled the trigger.

Lowery recalled that after he fired his weapon, he jumped to his left expecting to be hit by the oncoming truck. He states that he did not realize that his bullet had hit Fraire. After Fraire's vehicle veered to its left (Lowery's right) and ran up on the lawn of a house, Lowery ran to the truck and instructed the occupants to get out. Only when Rodriguez complied was it apparent to Lowery that Fraire was shot. Lowery instructed one of the bystanders to call 911 and the police dispatcher on Lowery's car radio. Fraire later died of a gun shot wound to the head.

The Arlington Police Department conducted an internal affairs investigation of the incident, and exonerated Lowery of the allegation that he used excessive force. The report of the investigation found that "Officer Lowery was within the

Texas Penal Code and the City of Arlington's use of force police to use deadly force to protect himself and effect the lawful arrest. A review of Officer Lowery's actions show no policy violations, however, there were tactical errors that might have possibly effected [sic] the outcome of the incident." Specifically, the investigation found that there was never any need for Lowery to follow the truck into the subdivision because it was a dead end, and that there was never any need for Lowery to get out of his vehicle: "[W]hen he got out of his car and stood in the cul-de-sac, he invited the truck to aim for him." Lowery was not disciplined in any way for his actions.

B. Proceedings

The Plaintiffs originally filed this Section 1983 action in Texas State Court

alleging that Lowery deprived Fraire of his constitutional rights under the Fourth and Fourteenth Amendments by using deadly force in a situation in which such force was unwarranted. In addition, the Plaintiffs alleged that Arlington had failed to implement policies and procedures pertaining to the utilization of deadly force by plain clothes officers, and that such failure deprived Fraire of his constitutional rights.[4] The complaint was later amended to allege that Arlington ratified Lowery's acts through their investigation and exoneration of Lowery

---

[4] The Plaintiffs also alleged that Lowery's conduct constituted negligence and gross negligence for which they sought to impose liability against Arlington under the Texas Tort Claims Act and the Texas Wrongful Death Act. The district court dismissed those pendent state claims, and the Plaintiffs do not challenge that decision on appeal.

because Arlington officials were aware that Lowery had not told the truth about how the shooting occurred.

Lowery and Arlington removed the action to the United States District Court. After discovery, Arlington and Lowery filed separate motions to dismiss, or in the alternative, for summary judgment. Lowery claimed the defense of qualified immunity.

The district court dismissed the Section 1983 action against Lowery. The court found that Lowery was qualifiedly immune in his individual capacity because

> [t]here is no summary judgment evidence that would support a conclusion that no reasonable officer, taking relevant factors into account, would have had the belief that his conduct was unlawful when responding as Lowery did. On the other hand, there is summary judgment evidence that leads to a conclusion that the actions Lowery took were actions that a reasonable officer could have believed lawful.

The court also dismissed all claims

against Arlington because the Plaintiffs had made only general accusations against the city and failed to plead with particularity, and because the Plaintiffs presented no evidence sufficient to counter Arlington's motion for summary judgment.

Finding that the district court did not err in dismissing the claims against Lowery and Arlington, we affirm.

II.

STANDARD OF REVIEW

As the district court considered summary judgment evidence in deciding these motions to dismiss or, in the alternative, motions for summary judgment, we must treat the decision as one for summary judgment.

This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the

first instance.[5] We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party."[6] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] Fed.R.Civ.P. 56(e) requires that when a proper motion for summary judgment is made, the non-moving party must set

---

5 Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988).

6 Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir.1984)).

7 Fed.R.Civ.P. 56(c).

forth specific facts showing that there is a genuine issue for trial.[8] The mere allegation of a factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[9] "Material facts" are "facts that might affect the outcome of the suit under the governing law."[10]

III.

ANALYSIS

A. The Claims against Lowery

---

[8] Id.; See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[9] Id. at 248, 106 S.Ct. at 2510.

[10] Id.

Lowery is a public safety official entitled to assert a qualified immunity defense,[11] and he did so. Substantively, qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[12] Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of

---

11 See Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir.1986), cert denied, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764 (1987).

12 Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987).

clearly established law.[13] The Supreme Court explained that when a plaintiff invokes a clearly established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right."[14] If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity.[15] Thus, when a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was

---

[13] See id., 483 U.S. at 639, 107 S.Ct. at 3038.

[14] Id. at 640, 107 S.Ct. at 3039.

[15] Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

objectively reasonable.[16]

The Plaintiffs allege that Lowery employed excessive force to effect an arrest.[17] The objective reasonableness of Lowery's conduct must be measured with reference to the law as it existed at the time of the conduct in question.[18] The conduct in question occurred in 1987. At

---

[16] See Melear v. Spears, 862 F.2d 1177, 1188 (5th Cir.1989) (Higginbotham, J. concurring).

[17] Regardless of whether Lowery was attempting to, or at the very least intended to arrest Fraire, the Fourth Amendment prohibition against unreasonable searches and seizures is implicated because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Tennessee v. Garner, 471 U.S. 1,7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). See also Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

[18] See Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982).

that time, the standards set forth in Shillingford v. Holmes [19] were the clearly established law in this circuit with respect to excessive force in the context of the Fourth Amendment.

In Shillingford, we held that to maintain an excessive force claim a plaintiff must prove that the defendant's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience....[20] In this case, Lowery is entitled to qualified immunity against the Plaintiffs' claims if a reasonable

---

[19] 634 F.2d 263 (5th Cir. Unit A Jan. 1981).

[20] Id. at 265.

police officer could conclude that conduct such as Lowery's would not violate the right of a person such as Fraire to be free from excessive force as enunciated in Shillingford. [21]

There is no question that Fraire's injury was "severe." Moreover, if we determine that Lowery's acts were not "grossly disproportionate to the need for action under the circumstances," we need never reach the "malice" prong of Shillingford's conjunctive, tripartite test-force grossly disproportionate to that needed under the circumstances.

The Plaintiffs characterize this case as one in which Lowery employed excessive force to effect an arrest of a misdemeanant. In response, Lowery insists

---

[21] See Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed. 271 (1986).

that, even as late as the time he entered the cul-de-sac, he had no intention of stopping Fraire to arrest him,[22] but was forced to shoot Fraire in self-defense because Fraire was attempting to run Lowery down with the pickup. Lowery's contentions are borne out by both his and Rodriguez' account of the "chase" and by the eye-witness accounts of the shooting. After Lowery entered the cul-de-sac and left his car, he was clearly in personal danger of being inured or killed. Statements of eye-witnesses included:

> "The truck was still moving and headed straight for the man in the blue car." "I heard the officer yell: halt. The truck was within a car length of the officer when he fired his gun." "I saw the man pull out a gun and yell, 'Police, stop!' The truck just kept coming right at him, and he fired the gun." "[H]e ordered the pickup to stop by saying, 'Police officer, halt!' The

---

[22] Lowery had already called for a marked police car for that purpose.

tuck kept coming at him and accelerated [at] him. The officer had his gun drawn and he waited until the very last second before he fired. If he had waited any longer they would have run over him."

"The driver in the pickup started to pull forward, and the man in the Chevrolet pulled out a gun and yelled 'Stop' again. The driver of the pickup kept coming straight at him, and the man shot the driver."

"He drew his gun and yelled, 'Police, stop!' The pickup kept coming right at him, and at the last possible second the man fired."

In his statement to the police later that afternoon, Rodriguez was asked whether Fraire's truck was gong to hit Lowery. Even in his hostility he admitted, "It was close."

For the purposes of our inquiry under Shillingford, the question becomes not whether Lowery' actions were grossly disproportionate to the need for action in arresting Fraire for a misdemeanor offense but whether his action were grossly

disproportionate to the need to defend himself from attack. On one hand, the Plaintiffs have not offered any summary judgment evidence supporting their contention that Lowery's use of force in defending himself was grossly disproportionate to the need. On the other hand, the undisputed facts demonstrate conclusively that Lowery did not use force grossly disproportionate to this self defense need. Specifically, it is undisputed that Lowery observed Fraire and Rodriguez drinking and driving on the principal thoroughfare; that Fraire turned onto a residential street and pulled into the first driveway in an attempt to evade Lowery thought trickery; that when this ploy failed Fraire backed out of the driveway and sped down the residential street into the residential neighborhood;

that Fraire then crashed the truck, told Rodriguez to throw the beer out the window and backed up, nearly ramming Lowery's car; that Fraire then sped away and turned into the cul-de-sac, hitting the curb and killing the engine of the truck; that, instead of remaining stopped as lawfully ordered, he started the truck, turned around and headed out; and that, with Lowery on foot and yelling"Police, Stop!", Fraire drove straight at Lowery showing no sign of attempting to stop or drive around him. It was only at the moment when it became imminently clear to Lowery, as it was to the eye-witnesses, that Fraire was going to run Lowery down, that he fired a single shot in self-defense. Although all of the final action occurred in a matter of seconds, there can be no doubt that Lowery's action was one of virtual

instinctive self-preservation in no way related to his original concerns with the open container laws, a concern by then long since evaporated.

The question, then, is whether under these circumstances a reasonable officer could conclude that Lowery used force grossly disproportionate to need when he shot Fraire in the belief that Fraire was trying to kill Lowery or cause great bodily harm by running over him with the truck.

Our holding in Young v. City of Killeen [23] is instructive. In that case a police officer observed a drug transaction between Young and another person. The officer approached the suspects in his car with the light flashing. Young attempted to flee in his car, but the officer blocked Young's

---

[23] 775 F.2d 1349 (5th Cir.1985).

path. The officer left his car and told Young to get out of his. When Young reached under his seat for what appeared to be a weapon, the officer shot and killed him. Under those facts, the court found that the actions of the officer were not excessive to the need. In so holding, the court stated that if Young's action gave the officer cause to believe that he was under a threat of serious harm, then the officer's use of deadly force was not a constitutional violation.[24]

Young is pertinent to the instant case for another reason. The Plaintiffs have charged that the force Lowery employed was excessive, at least in part because Lowery may not have followed established police procedures in displaying his badge and

---

[24] Id. at 1353.

identifying himself while in plain clothes. The implication is that Lowery thereby manufactured the circumstances that gave rise to the fatal shooting.[25] We rejected a similar argument in Young. There, the district court found that the officer had acted negligently and contrary to good police procedure. On appeal, we noted that "[t]he sense in which [the district court] finds excessive force in that the force would have been avoided if [the policeman] had approached Young as required by proper police procedures."[26] We found to the contrary, however, that regardless of what had transpired up until the shooting

---

[25] Of course, Lowery disputes this. He maintains that the prominently displayed his badge to Fraire and Rodriguez when the pair stopped in the driveway on the side street and when he exited his car in the cul-de-sac.

[26] Id. at 1352.

itself, Young's movements gave the officer reason to believe, at that moment, that there was a threat of physical harm. We said:

> The constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation.[27]

We do not mean to imply that we in any way find Lowery's actions leading up to the shooting to be negligent. We merely explain that even a negligent departure from established police procedure does not necessarily signal violation of constitutional protection.

We are also guided by the Supreme Court's conclusion in Tennessee v. Garner

---

[27] Id. at 1353.

28:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon ... deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[29]

At the moment of the shooting, Lowery does not appear to have been trying to hinder Fraire's escape. Rather, as Lowery avers, he clearly appears to have been trying to prevent his own serious injury or death. Certainly then, because under the rationale

---

[28] 471 U.S.1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

[29] Id, at 11-12, 105 S.Ct. at 1071. In Garner, the court found excessive use of force by a police officer who shot an unarmed fleeing felony suspect who posed no danger to the officer. The Plaintiffs urge that the result in Garner should dictate our decision here because Garner was a felony suspect and Fraire was only an unarmed misdemeanant.

of Garner Lowery could have used deadly force to prevent Fraire's escape, considering Fraire's actions leading up to the shooting[30] Lowery must have been justified in firing to prevent his own death or great bodily harm.

Finally, Lowery's actions cannot be viewed as grossly disproportionate because he acted well within his rights under Section 9.51(c) of the Texas Penal Code which governs the use of deadly force. This statute provides in pertinent part that:

> A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) of this section and :

---

[30] I.e., drinking while driving, erratic driving.

> (2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.[31]

Subsection (a) provides that the use of force is justified if (1) the police officer reasonably believes the arrest is lawful, and (2) before using force, the officer manifests his purpose to make an arrest and identifies himself as a police officer, unless he reasonably believes that this purpose and identity are already known by or cannot reasonably be made known to the arrestee.[32]

Here, Lowery satisfied the requirements of both subsections 9.51(a) and (c). Specifically, Lowery had probable cause to stop Fraire because Fraire was observed by

---

[31]

[32] Id. Section 9.51(a).

Lowery to be drinking and driving. Lowery had more than a reasonable basis to believe that Fraire might cause death or serious bodily injury to himself or others based on the facts that (1) in attempting to flee, Fraire drove recklessly and at a high speed into and around a residential neighborhood on a Sunday afternoon, and (2) attempted to run Lowery down.

Lowery's actions cannot be said to be grossly disproportionate to his self defense need under the circumstances. The eye-witness accounts confirm that Lowery was in mortal danger of being run over by Fraire's pickup, and that Lowery waited to fire until the last second when the truck was dangerously close. In fact, had the truck not veered to the left when Fraire was shot, Lowery might still have been severely injured or killed. We cannot say

that a reasonable police officer in Lowery's place would have understood his actions to be unlawful. All things considered, we find as did the district court that Lowery is entitled to qualified immunity.

B. The Claims Against the City

In Monell v. New York City Department of Social Services, [33] the Supreme Court held that municipalities may be liable for damages under Section 1983, but only when an official policy or governmental custom of the municipality causes the deprivation or violation of the constitutional rights complained of by the plaintiff. The municipal policy or custom must cause the employee to violate another's constitutional rights:

---

[33] 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under Section 1983.[34]

Thus, Section 1983 liability attaches "only where the municipality itself cause the constitutional violation at issue."[35]

In their amended complaint, the Plaintiffs made certain allegations against the City of Arlington:

> 20. Plaintiffs would further allege that the rules, regulations and policies of Defendant City of Arlington, as well as the training program in existence prior to and at the time of the shooting of Javier Fraire did not emphasize that the use of lethal force against a person or citizen should be exercised only as a last resort when all other methods of apprehension have failed, in accordance with and pursuant to the requirements

---

[34] Id. at 694, 98 S.Ct. at 2037.

[35] City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989). (emphasis in original)

of the Fourth Amendment of the United States Constitution, made applicable to Defendants by the Fourteenth Amendment tot the United States Constitution. A result of the failure of Defendant City of Arlington to implement such policies, procedures and training programs designed to educate police officers in the utilization of deadly force only as a last resort, Decedent Javier Fraire was killed while other means of apprehension were readily available to Defendant Lowery and other employees of Defendant City of Arlington.

21. Plaintiffs would allege and prove that it was the custom and practice both before and after [the date of the shooting] for employees and officers of the City of Arlington to utilize deadly force in contravention of the standards and guidelines which comport with the Fourth and Fourteenth Amendments to the United States Constitution. In this regard, Plaintiffs would allege and prove that the investigation into the shooting of Javier Fraire by Defendant City of Arlington and the ultimate exoneration of Defendant James W. Lowery, Jr. in justifying his use of said force is direct evidence on the existence of such custom or practice. Specifically, Plaintiffs would allege that representatives of Defendant City of Arlington were aware that Defendant James W. Lowery, Jr. was not telling the truth in his explanation of how the shooting of Javier Fraire occurred in that his version of the incident

conflicted with every eyewitness to the occurrence.

The district court found that these allegations were insufficient to satisfy the standards for stating a cause of action against a municipality under Section 1983. We agree. We have consistently required a plaintiff to plead "specific facts, not merely conclusory allegations."[36] A Section 1983 plaintiff must plead specific facts with sufficient particularity to meet all the elements of recovery.[37] This heightened pleading requirement applies to allegations of municipal custom or

---

[36] Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).

[37] Id. at 1482.

policy.[38]

The Plaintiffs did not come close to the degree of particularity required to plead a Section 1983 claim adequately. The "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints"[39] are wholly insufficient to state a Section 1983 claim. They state no facts to support their bald assertions that Arlington's policies, or its failure to implement policies, in any way violated Fraire's constitutional rights and contributed to his unfortunate death.

Moreover, even if we were to conclude that the Plaintiffs had met their burden

---

[38] Rodriguez v. Avita, 871 F.2d 552 (5th Cir.1989) cert denied 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989); Palmer v. City of San Antonio, 810 F.2d 514 (5th Cir.1987).

[39] Elliott, 751 F.2d at 1476.

of pleading this Section 1983 claim with particularity, we could not find that they overcame their burden of producing specific facts showing a genuine issue of material fact for trial. Just as they did with respect to their complaints, the Plaintiffs have failed to come forward with specific facts sufficient to counter Arlington's contentions that its policies and customs were not constitutionally deficient. They merely argue that the city ratified Lowery's actions because it refused to discipline him, and because it allegedly knew that Lowery's version of the incident was untrue. Such allegations are wholly insufficient to satisfy the nonmovants' summary judgment burden.

Allegations of an isolated incident are not sufficient to show the existence of a

custom or policy.[40] "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy."[41] To demonstrate a municipal custom or policy under Section 1983, a plaintiff must at least allege:

> a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.[42]

This the Plaintiffs did not do.

The Plaintiffs allege, however, that an unconstitutional custom or policy can be

---

[40] Rodriguez, 871 F.2d at 554; Palmer, 810 F.2d at 516.

[41] Bennett v. City of Slidell, 728 F.2d 762, 768 n.3 (5th Cir.1984), cert denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

[42] Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir.1983), cert denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.E.2d 363 (1984).

inferred from the city's failure to discipline Lowery. We are not persuaded by this argument. In fact, we rejected a similar argument advanced in Berry v. McLemore.[43] There we found that a city's custom or policy authorizing or encouraging police misconduct "cannot be inferred from municipality's isolated decision not to discipline a single officer of a single incident of illegality".[44]

---

[43] 670 F.2d 30 (5th Cir.1982) (overruled on other grounds, International Woodworkers of America v. Champion International Corporation, 790 F.2d 1174, 1181 (5th Cir.1986).

[44] Id at 33. Other circuits have taken the same position. See Santiago v. Fenton, 891 F.2d 373, 380-82 (1st Cir.1989); Batista v. Rodriguez, 702 F.2d 393, 397-8 (2nd Cir.1983); Harris v. City of Pagedale, 821 F.2d 499 (8th Cir.), cert. denied, 484 U.S.986, 108 S.Ct. 504, 98 L.Ed.2d 502 (1987); Davis v. City of Ellensburg, 869 F.2d 1230, 1233-35 (9th Cir. 1989); Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir.1986).

Moreover, the Plaintiffs present nothing but conjecture when they allege that Arlington must have know Lowery was lying. They base this conjecture on the fact that the eye-witnesses placed Lowery away from his car toward the middle of the cul-de-sac at the time of the shooting, while Lowery said that he was using his car as a shield. Plaintiffs also contend that the initial conversation between Lowery and the occupants of the truck while it was in the driveway could not have taken place in the 24 seconds between Lowery's radio transmissions.

Under the circumstances of this fast moving and rapidly changing incident, we are not surprised that there are relatively minor discrepancies among the stories told by Lowery, Rodriguez and the bystanders on the cul-de-sac. We have learned to expect

that, given the tension and heat of the pursuit and the element of surprise in such a stressful situation, the versions of the facts related by the protagonists and the witnesses will almost always differ somewhat in the myriad details of the action. But in this case such differences are insufficient to place facts at issue. And they are especially lacking in significance when used in an effort to "prove" that the city knew Lowery was lying and that, therefore, the city must have intended to ratify Lowery's actions. The minor factual discrepancies are far too petty to constitute genuine issues of material fact.

Furthermore, the Plaintiffs made no attempt to counter the City's evidence of the polices actually in effect at the time of the shooting. They city's chief of

police [45] testified by affidavit in support of the City's motion to dismiss regarding the polices rules and regulations of his department. He averred that the conduct of Arlington police officers is primarily controlled by the police department's General Orders, first issued at least two years prior to the instant shooting. All Arlington officers are issued copies of the General Orders, are trained in their application, and are required to comply with them.

The police chief also averred that Arlington's police officers have never been

---

[45] The chief of police is the principal policy maker for the Arlington Police Department. As such he promulgates all orders, rules and regulations for the department. He is also ultimately responsible for the supervision of the investigation of complaints made against police officers, and has the right to discipline or terminate any police officer for just and reasonable cause..

permitted to use unnecessary, unreasonable or excessive force in the performance of their duties. General Order 317.00, entitled "Use of Force", was in effect on the date of the shooting. It states that a police officer is afforded only a limited degree of discretion in determining the amount and degree of force used in particular cases. Those discretionary areas are described in General order 317.02, and include situations in which the police officer is acting in self-defense against unlawful violence to his person. Officers are admonished in General Order 317.03 that under no circumstances will the force used be greater than necessary. An Arlington police officer is responsible for exhausting every reasonable means of employing the minimum amount of force before escalating to a more severe

application of force.

Arlington police are authorized to use deadly force only under the specific circumstances listed in 317.05(b), which expressly authorizes officers to use deadly force only when doing so reasonably appears immediately necessary to protect themselves from substantial risk of death or serious bodily injury. Furthermore, General Order 317.05(c)(5) specifically prohibits officers from discharging their firearms in a misdemeanor case unless such discharge is necessary to defend life, including the officer's life. General Order 317.05(c)(6) prohibits officers from shooting at moving or fleeing vehicles, except when necessary to protect the officer's life and all other means of defense have failed.

To prevail in their claims against the City of Arlington, the Plaintiffs must show

that these policies are constitutionally deficient or that they authorize unconstitutional behavior. Further, the Plaintiffs must show that the deadly force policy caused Lowery to use excessive force against Fraire.

The bellwether case regarding a police officer's use of deadly force is Tennessee v. Garner.[46] In that case, a police officer shot and killed a burglary suspect when after being told to halt, the suspect fled over a fence at night in the backyard of the house he was suspected of burglarizing. The police officer never attempted to justify his actions on any basis other than the need to prevent an escape. The Supreme Court found that there was no reason to believe that the burglary

---

[46] 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

suspect posed any danger to the police officer or to others. The Court held that the use of deadly force solely to prevent the escape of a felony suspect, whatever the circumstances, is constitutionally unreasonable:

> Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.... A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.[47]

The Court further declared, however, that when a police officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, the use of deadly force is not constitutionally unreasonable to prevent an escape.[48] Nothing in Garner

---

[47] Id at 105 S.Ct. at 1701.

[48] Id.

prohibits an officer from using deadly force in self-defense when the officer has probable cause to believe that the suspect poses a threat of serious physical injury or death to the officer.

Arlington's deadly force policy in effect on the date of the incident is consistent with, and in fact is more restrictive than the standards required by Garner. Arlington's General Order 317.05(B) authorizes the use of deadly force only (1) when such force reasonably appears immediately necessary to protect the officer or others from substantial risk of death or serious bodily injury, (2) to prevent a crime or make an arrest when the suspect's actions place persons in jeopardy of serious bodily injury, (3) to apprehend an offender for a crime involving the use or attempted use of deadly force or when

there is a substantial risk that the person whose arrest is sought will cause death or serious bodily injury to others if apprehension is delayed, or (4) to prevent escape from custody when the officer or others are in imminent danger of death or serious bodily injury.

General Order 317.05(C) further restricts the use of deadly force in several specific situations. Arlington police officers are prohibited from discharging their firearms in any misdemeanor case, except in defense of life. Officers are also prohibited from firing their weapons at a moving or fleeing vehicle, again unless necessary to defend life and all other reasonable means of defense have failed.

Plaintiffs make much of the fact that three months after the Lowery incident,

Arlington amended its deadly force policy to prohibit an officer from intentionally or recklessly placing himself in front of an ongoing vehicle when the utilization of force is a likely outcome. The Plaintiffs assert that had this amended version of the policy been in effect at the time, Lowery would have been prohibited from making the maneuver he used when he shot Fraire, and that this amendment is direct evidence in support of the Plaintiffs' allegation that Arlington's policies, procedures and regulations were constitutionally defective at the time of the shooting. Such reasoning defies logic. As we just observed, Arlington's policies, procedures and regulations comported with and were even more restrictive than those required by Garner. The plaintiffs have pointed to no authority showing that the

new restriction is constitutionally mandated. Furthermore, just because Arlington amended its polices to make them more restrictive, it does not follow that the prior policies were constitutionally deficient. Moreover, the Plaintiffs engage in mere speculation, when they posit that if the new restriction had been in effect on the day Fraire was killed, the shooting would not have occurred; ergo the absence of the restriction caused the shooting. As we stated above, a direct causal connection must exist between the policy and the alleged constitutional deprivation. This connection must be more than a mere "but for" coupling between cause and effect.[49] To form the basis of liability under

---

[49] See City of Canton, 109 S.Ct. at 1204-04; Oklahoma City v. Tuttle, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985).

Section 1983, a municipal policy must be affirmatively linked to the constitutional violation and be the moving force behind it.[50]

The Plaintiffs have presented no summary judgment evidence that would place at issue any material facts with respect to the constitutionality of the Arlington deadly force policy. They have pointed to no provision in that policy that could be construed to authorize an office to use deadly force unnecessarily or unjustifiably. Neither is there any evidence that Arlington's deadly force policy in effect at the time of the shooting caused Lowery to use deadly force in violation of the Constitution. We find

---

[50] Polk County v. Dodson, 454 U.S. 312,326 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981).

that the Plaintiffs' claims against Arlington are unfounded.

IV

CONCLUSION

Officer Lowery acted in self defense when he fired a fatal shot at Fraire. Under the circumstances of this case, a reasonable police officer could have believed that in firing he was not violating Fraire's constitutional right to be free of excessive force. Consequently, Lowery is entitled to the defense of qualified immunity for his actions in defending his life.

In addition, the Plaintiffs failed to plead with sufficient particularity the facts and allegations necessary to present a claim against the City of Arlington under 42 U.S.C. Section 1983. Neither did the Plaintiffs proffer summary judgment

evidence that Arlington's deadly force policy condones the unjustifiable and unnecessary use of deadly force.

For the foregoing reasons, the district court's judgment dismissing the claims against Lowery and the City of Arlington is AFFIRMED.

APPENDIX B

Order Denying Motion for
Rehearing of May 7, 1992

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 91-1597

MARIA DEL ROSARIO C. FRAIRE, Individually and as Next Friend for MYRA FRAIRE and JUAN ANTONIO FRAIRE, Minor Children, and JOSEFA ESQUIVEL FRAIRE,

Plaintiffs-Appellants,

versus

CITY OF ARLINGTON and JAMES W. LOWERY, JR.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(May 7, 1992)

Before JONES, DUHE, and WEINER, Circuit Judges:

PER CURIAM:

IT IS ORDERED that the petition for

rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

District Court Opinion of May 16, 1991

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARIA DEL ROSARIO FRAIRE, INDIVIDUALLY AND AS NEXT FRIEND FOR MYRA FRAIRE AND JUAN ANTONIO FRAIRE, MINOR CHILDREN, AND JOSEFA ESQUIVEL FRAIRE	)	
Plaintiffs	)	CIVIL ACTION NO. 4-89-826-A
v.	)	
CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,	)	
Defendants	)	

MEMORANDUM OPINION
AND ORDER

Came on to be considered the motions to dismiss and for summary judgment of defendants, City of Arlington and James W. Lowery, Jr., respectively. The court has determined that the dismissals sought by City of Arlington's motions should be

granted, that plaintiffs' Section 1983[1] claims against Lowery should be dismissed, and that plaintiffs' state law claims against Lowery should be remanded to state court.

Plaintiffs are seeking in this removed action to recover damages alleged to have been caused by a fatal gunshot wound suffered by Javier Fraire ("Fraire") at the hands of defendant Lowery. Plaintiffs are Fraire's survivors. In general, plaintiffs allege that Lowery, a police officer of the City of Arlington, while out of uniform, without identifying himself as a police officer, and while operating an unmarked police automobile, gave chase to Fraire's pickup truck, which was occupied by Fraire and a passenger, because of suspicion that

---

[1] 42 U.S.C. Section 1983.

Fraire was operating his vehicle while intoxicated, and that the chase terminated with the fatal shooting. The allegations of plaintiffs concerning the final phase of the chase and the fatal confrontation are, as contained in the amended petition, as follows:

> After the pickup returned to the street, Javier Fraire placed the pickup in drive and proceeded down Willowbrook until he made a left hand turn on Creekmeer Court. Plaintiffs would show that Creekmeer Court is a cul-de-sac, to-wit, a circular street with no exit other than return through its entrance. As the pickup driven by Javier Fraire negotiated the circle, the unmarked vehicle driven by James W. Lowery, Jr. continued to follow it in hot pursuit. As Fraire proceeded to turn in the cul-de-sac, Defendant James W. Lowery, Jr., parked his automobile, exited his vehicle, pulled his .9mm semi-automatic weapon, and walked or ran to a position in the cul-de-sac blocking the exit of the pickup driven by Javier Fraire. As Fraire's vehicle proceeded to leave the cul-de-sac, Lowery fired one shot hitting Fraire in the head. As a result of the wound inflicted by Defendant James W. Lowery, Jr., Javier Fraire subsequently died later on November 22, 1987.

16. At no time during the chronology above described did Defendant James W. Lowery, Jr. exhibit or show a badge identifying him as an officer of the Arlington Police Department. As a result, during the entire chronology above described, at no time did the occupants of the vehicle driven by Javier Fraire know that the Defendant James W. Lowery, Jr. was a police officer.

17. Plaintiffs would allege and prove that Lowery's maneuver in intentionally placing himself in front of the vehicle driven by Javier Fraire in an effort to apprehend the occupants of the vehicle for the suspected crime of driving while intoxicated and subsequently utilizing deadly force in killing Javier Fraire, constituted an unlawful seizure in violation of those rights granted to Javier Fraire by the Fourth and Fourteenth Amendments of the United States Constitution.

First Amended Complaint, pages 7-9.

Lowery's motion for summary judgment presents the issue of whether plaintiffs have failed to plead a cognizable claim against him under 28 U.S.C. Section 1983 and the Fourth Amendment to the

Constitution of the United States, whether plaintiffs have failed to plead sufficient facts to overcome Lowery's qualified immunity defense, and whether plaintiffs' claims against Lowery are barred, in whole or in part, by the qualified-immunity defense as a matter of law. Defendant James Lowery's Motion to Dismiss or, in the Alternative, for Summary Judgment and Brief in Support, pages 10-11.

The summary judgment record includes affidavits of Lowery and Fraire's passenger and copies of affidavits or statements of numerous witnesses to the event, among which is an investigative question and answer statement of Fraire's passenger. No party has challenged any of the proffered evidence as being inappropriate to be considered for summary judgment purposes. Once Lowery put in issue by motion for

summary judgment the existence of a viable Section 1983 cause of action, plaintiffs had the burden, in order to avoid summary judgment, to come forward with summary judgment evidence showing factual basis for each of the essential elements of a Section 1983 case. Cf. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

When a fact-specific inquiry is made into the objective question of whether a reasonable officer could have believed Lowery's conduct lawful, in the light of clearly established law and the information he possessed, an affirmative answer is inevitable. Cf. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Plaintiffs admit by the allegations of their complaint that Lowery suspected Fraire of the crime of driving while intoxicated, and plaintiffs have pleaded that Lowery intentionally

placed himself in front of Fraire's vehicle in an effort to apprehend Fraire for that crime. There is summary judgment evidence that Lowery was in danger of physical harm from Fraire's operation of the pickup truck, and that Lowery fired at Fraire in response to the threat of harm to himself. There is no genuine dispute that Fraire knew Lowery was a law enforcement officer for a period of time before he made his fatal decision to drive his pickup toward Lowery.[2] Any two officers might have responded differently to the situation with which Lowery was faced, but the question is not whether another officer, or even

---

[2] Appendix in Support of Plaintiffs' Response to Defendants' Motions to Dismiss, or in the Alternative, for Summary Judgment and Brief in Support, Investigative Interview of Jose Luis Rodriguez, pages 7-8. Also see paragraphs 20 and 21 of admitted facts on pages 15 and 16 of Pretrial Order.

another reasonable officer, would have responded in a different manner. Rather, the issue is whether Lowery took actions "that a reasonable officer could have believed lawful" -- if he did, he is entitled to dismissal. Id. at 646 n. 6. There might have been more than one course of action from which an officer reasonably could have chosen under the circumstances.

There is no summary judgment evidence that would support a conclusion that no reasonable officer, taking relevant factors into account, would have had the belief that his conduct was lawful when responding as Lowery did. On the other hand, there is summary judgment evidence that leads to a conclusion that the actions Lowery took were actions that a reasonable officer could have believed lawful. Lowery's efforts to prevent an intoxicated driver

from continuing his journey to the risk of other members of the traveling public could be viewed by a reasonable officer to be appropriate. When in the course of those actions Lowery's physical safety became imperiled, his response by gunfire could be thought by a reasonable officer to be an appropriate and reasonable one. Obviously, no reasonable officer would intentionally kill an intoxicated driver just to put an end to his drunken journey. This case is not so simple. It must be viewed from the standpoint of reasonableness of Lowery's conduct at more than one point in time. When thus viewed, the conclusions become apparent that at each step of the way Lowery took action that a reasonable officer could have believed lawful. In hindsight, perhaps he made a mistake or a grievous error, but that is not the test

that determines whether he has Section 1983 liability. See Graham v. Connor, 490 U.S. 386, 396 (1989). The court, therefore, is ordering dismissal of plaintiffs' Section 1983 action against Lowery individually.

Plaintiffs say that they are suing Lowery in his official capacity as well as individually. To whatever extent plaintiffs' complaint might be considered to be an action against Lowery under Section 1983 in his official capacity, it is dismissed, both in response to Lowery's motion to dismiss and Rule 56 motion. In Brandon v. Holt, 469 U.S. 464 (1985), the Supreme Court made clear that an action brought under Section 1983 against a police official in his official capacity is tantamount to an action against the public entity for which the official is alleged to act. Id. at 472. Individual liability of

the official cannot flow from a suit against him in his official capacity. A judgment against him in that capacity is the same as a judgment against the public entity he represents, assuming that the public entity has received notice and an opportunity to respond. Id. at 471-72. There is no reason for this action to be maintained against Lowery in his official capacity and at the same time against City of Arlington. All Section 1983 claims against Lowery, in any capacity, are being dismissed.

Because of the decision of the court to grant dismissal of all claims asserted by plaintiffs against the other defendant, City of Arlington, the court does not have subject matter jurisdiction over the remaining causes of action. Therefore, the court has determined that plaintiffs'

pendent state law claims against Lowery should be remanded to the state court from which this action was removed. See Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966); Carnegie-Mellon Univ. v. Cohill, 489 U.S. 343, 351-52 (1988).

Turning now to plaintiffs' allegations against City of Arlington. In pertinent part, plaintiffs' allegations against City of Arlington are that:

> 20. Plaintiffs would further allege that the rules, regulations and policies of Defendant City of Arlington, as well as the training program in existence prior to and at the time of the shooting of Javier Fraire did not emphasize that the use of lethal force against a person or citizen should be exercised only as a last resort when all other methods of apprehension have failed, in accordance with and pursuant to the requirements of the Fourth Amendment of the United States Constitution, made applicable to Defendants by the Fourteenth Amendment to the United States Constitution. As a result of the failure of Defendant City of Arlington to implement such policies, procedures and training programs designed to educate police

officers in the utilization of deadly force only as a last resort, Decedent Javier Fraire was killed while other means of apprehension were readily available to Defendant Lowery and other employees of Defendant City of Arlington.

21. Plaintiffs would allege and prove that it was the custom and practice both before and after November 22, 1987, for employees and officers of the City of Arlington to utilize deadly force in contravention of the standards and guidelines which comport with the Fourth and Fourteenth Amendments to the United States Constitution. In this regard, Plaintiffs would allege and prove that the investigation into the shooting of Javier Fraire by Defendant City of Arlington and the ultimate exoneration of Defendant James W. Lowery, Jr. in justifying his use of said force is direct evidence on the existence of such custom or practice. Specifically, Plaintiffs would allege that representatives of Defendant City of Arlington were aware that Defendant James W. Lowery, Jr. was not telling the truth in his explanation of how the shooting of Javier Fraire occurred in that his version of the incident conflicted with every eyewitness to the occurrence.

Amended Complaint, pages 9-11.

These allegations are not sufficient to satisfy the standards for statement of a cause of action against a municipality under Section 1983. The Fifth Circuit repeatedly has held that district courts should hold plaintiffs in Section 1983 actions such as this to a high degree of particularity in their pleadings. See Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir. 1989); Palmer v. City of San Antonio, Texas, 810 F.2d 514, 516 (5th Cir. 1987); Elliott v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985); and, Morrison v. City of Baton Rouge, 761 F.2d 242, 244-45 (5th Cir. 1985). Elliott explained the policy reasons why "blunderbuss phrasing of the arguable claims in the plaintiffs' complaints" will not suffice, and noted that a lack of pleading particularity "eviscerates important functions and

protections of official immunity." Elliott, 751 F.2d at 1476. In Elliott, the Fifth Circuit stated that "[i]n the now familiar cases involving 42 U.S.C. Section 1983 we consistently require the claimant to state specific facts, not merely conclusory allegations." Id. at 1479,

While Elliott dealt with an action against public officials, its principles apply with equal force to an action against a public entity. Palmer was such an action. Apropos to the instant case, the Fifth Circuit said in Palmer:

> Similarly, an isolated incident is not sufficient to show that a custom exists. As we stated in Bennett v. City of Slidell, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985): "Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy."
>
> * * *
>
> We have also consistently required

> a section 1983 plaintiff to state specific facts and not merely conclusory allegations. Elliott v. Perez, 751 F.2d 1472, 1479 & n. 20 (5th Cir. 1985) (citing cases). While it might be possible that a basis for municipal liability exists in this case, Palmer states no facts in his complaint to support his assertion that San Antonio authorized and approved the practice of its police officers using excessive force when making arrests or that such a well settled practice of doing so existed. Although Palmer has already amended his complaint once, the compliant still fails to meet the requirements of Elliott. As we have made clear, the assertion of a single incident is not sufficient to show that a policy or custom exists on the part of a municipality. Slidell, 728 F.2d n. 3. Palmer failed to allege that there are prior incidents which if taken as true, would reveal the existence of an unconstitutional custom on the part of San Antonio. Accordingly, we affirm the district court's order of dismissal with respect to the city of San Antonio.

Id. at 516-17.

Rodriguez made clear that boilerplate, conclusionary allegations combined with a description of a single incident will not suffice. When speaking in reference to a

pleading that was no more generally worded than the one involved in this action, the court stated:

> Such a pleading does no more than describe a single incident of arguably excessive force applied by one officer--a description decked out with general claims of inadequate training and gross negligence, all concededly stemming from the single incident and nowhere else. It is clear from counsel's quoted colloquy with the trial judge that he has pled his case fully and has nothing to add, that the sole foundation for his general and conclusory allegations of "gross negligence" and "grossly inadequate training" was the pleaded incident itself. Under the rules of Tuttle and Languirand discussed above, there is no case--not as a matter of pleading, merely, but as one of conceded fact.

Id. at 555.

Plaintiffs have been given an opportunity since the filing of the motions to dismiss and for summary judgment to amend their complaint, and have availed themselves of that opportunity. Still, their theories of municipal entity

liability against City of Arlington are blunderbuss in character and describe only an isolated incident "decked out in general claims of inadequate training..." and custom and practice. Id. at 555.

Even is the court were to overlook the inadequacies in plaintiffs' allegations against City of Arlington, plaintiff nevertheless would be unable to clear the hurdle created by City of Arlington's Rule 56 motion. In McKee v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989), the Fifth Circuit considered an action against a public entity under Section 1983 in a summary judgment context. The claim of McKee was based on an alleged policy of the Rockwall police department discouraging arrests in domestic violence cases, which McKee contended discriminated against women. In the course of discussing McKee's

summary judgment burden on the issue of whether the police department had a discriminatory policy, the court explained:

> McKee must present some evidence of such a policy in order to survive the defendants' summary judgment motion. When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

Id. at 414-15 (quoting ... Celotex Corp.v. Catrett, 477 U.S. 317, 323 (1986)).

Although the court was applying City of Canton[3] to a claim of individual liability rather than to a claim public entity liability, the Third Circuit in Sample v. Diecks, 885 F.2d 1099 (3rd Cir. 1989), provided a helpful discussion of the degree of proof that must be brought to bear by a

---

[3] City of Canton v. Harris, 489 U.S. 378 (1989).

plaintiff in order to avoid a summary disposition. The court said:

> Based on City of Canton, we conclude that a judgment could not properly be entered against Robinson in this case based on supervisory liability absent an identification by Sample of a specific supervisory practice or procedure that Robinson failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) Robinson was aware that this unreasonable risk existed, (3) Robinson was indifferent to that risk, and (4) Diecks' failure to assure that Sample's complaint received meaningful consideration resulted from Robinson's failure to employ that supervisory practice or procedure.....
>
> On remand, the district court should bear in mind that under the teachings of City of Canton it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did. The district court must insist that Sample identify specifically what it is that Robinson failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the officials's conduct evidenced

deliberate indifference and whether there is a close causal relationship between the "identified deficiency" and the "ultimate injury."

Id. at 1118.

In Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985), the Supreme Court emphasized the burden of proof in a case where liability is sought to be imposed under Monell[4], saying:

> Here the instructions allowed the jury to infer a thoroughly nebulous "policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident. Such an approach provides a means for circumventing Monell's limitations altogether. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the

---

[4] Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

> unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly reversed.

Id. at 823-24.

And, the heavy burden of proof to be borne by plaintiff in a case such as this was again recognized in Pembaur v. Cincinnati, 475 U.S. 469 (1986), where the court stated:

> We hold that municipal liability under Section 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See Tuttle, supra, at 823, 85 L Ed 2d 791,

> 1095 S Ct 2427 (" 'policy' generally implies a course of action consciously chosen from among various alternatives").

Id. at 483-84.

Plaintiffs' pendent state law claim against City of Arlington are equally unmeritorious. Police functions of a municipality are governmental functions for which the municipality, a general proposition, has immunity from liability. City of Dallas v. Moreau, 718 S.W.2d 776, 779 (Tex.App. - Corpus Christi 1986, writ ref'd n.r.e.); Cronen v. Nix. 611 S.W. 2d 651, 653 (Tex.Civ.App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.). The Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Section 101.021, provides exceptions to the immunity of liability, but none apply here.

One of the exceptions causes a governmental unit to be liable for death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment if the "death arises from the operation or use of a motor-driven vehicle...." Id. at Section 101.021. Plaintiffs place reliance on this section, alleging that Lowery:

> . . . was negligent in his utilization of a motor driven vehicle, to-wit, an unmarked police car, as he negligently pursued the vehicle driven by Defendant Javier Fraire at the time and on the occasion in question. But not for such pursuit, Defendant Lowery would not have utilized deadly force to shoot Javier Fraire.

First Amended Complaint, page 13. There are no allegations that Lowery operated the police vehicle negligently, nor have plaintiffs offered any summary judgment evidence to that effect. The theory of negligent "utilization" is unprecedented

and unsound. Even if there were an allegation of negligence on the part of Lowery in the operation of his vehicle, as a matter of law such negligence did not cause the death of Fraire. Certainly plaintiffs cannot adduce evidence that would satisfy the foreseeability element of proximate cause.

Another exception to the immunity from liability growing out of governmental functions has to do with death proximately caused by "use of tangible property." Tex. Civ. Prac. & Rem. Code, Section 101.021. Conceivably plaintiffs are contending that Lowery's failure to exhibit his badge constituted use of tangible property. However, Texas courts have held that the Texas Tort Claims Act does not cause a waiver of governmental immunity in all cases where some item of personal property

is either used, misused or not used and that the injury to a plaintiff must be proximately caused either by the negligence of an employee acting in the scope of his employment in that employee's use or misuse of tangible property or under circumstances where an employee or agent furnished tangible property, the use or misuse of which caused the personal injury. Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976). Hein v. Harris County, 557 S.W.2d 366 (Tex.Civ.App. - Houston [1st Dist] 1977, writ ref'd n.r.e.); and Williams v. State, 716 S.W.2d 96 (Tex. App. - Waco 1986, writ ref'd n.r.e.). As a matter of law, the failure of Lowery to exhibit his badge did not cause the death of Fraire. Indeed, as previously noted, the summary judgment record establishes that Fraire knew Lowery was a police officer somewhat

in advance of the final fatal encounter. Thus, the failure of Lowery to identify himself as a police officer has no relevance to this case.

For the reasons given in this opinion,

The court ORDERS (a) that all claims and causes of action asserted by plaintiffs against defendant Lowery under Section 1983 or the Constitution of the United States, be, and they are hereby, dismissed, (b) that all claims and causes of action asserted by plaintiffs against defendant City of Arlington on any basis or under any theory are hereby dismissed, and City of Arlington is discharged and relieved of any liability to plaintiffs, and (c) that all claims of plaintiffs against Lowery that have not been dismissed are remanded to the state court from which this action was removed.

SIGNED May _____ , 1991.

_____

JOHN McBRYDE
United States District Judge

APPENDIX D

Final Judgment of District Court
of May 16, 1991

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARIA DEL ROSARIO FRAIRE, INDIVIDUALLY AND AS NEXT FRIEND FOR MYRA FRAIRE AND JUAN ANTONIO FRAIRE, MINOR CHILDREN, AND JOSEFA ESQUIVEL FRAIRE	)	
Plaintiffs	)	CIVIL ACTION NO. 4-89-826-A
v.	)	
CITY OF ARLINGTON AND JAMES W. LOWERY, JR.,	)	
Defendants	)	

FINAL JUDGMENT

For the reasons given in the memorandum opinion and order signed by the court on this date,

THE COURT ORDERS, ADJUDGES and DECREES that all claims and causes of action

asserted by plaintiffs, Maria del Rosario C. Fraire, Myra Fraire, Juan Antonio Fraire, and Josefa Esquivel Fraire (who) are referred to in plaintiffs' pleading as "Maria del Rosario C. Fraire, individually and as next friend for Myra Fraire and Juan Antonio Fraire, minor children, and Josefa Esquivel Fraire") against defendant James W. Lowery, Jr., based upon or under 42 U.S.C. Section 1983 or the Constitution of the United States be, and they are hereby, dismissed;

The court further ORDERS, ADJUDGES and DECREES that all claims and causes of action asserted by plaintiffs against defendant City of Arlington, Texas, on any basis or under any theory are hereby dismissed;

The court further ORDERS, ADJUDGES and DECREES that all claims and causes of

action asserted by plaintiffs against defendant James W. Lowery, Jr., that are not being dismissed by this order, be, and are hereby, remanded to the state court from which this action was removed; and

The court further ORDERS that defendant City of Arlington, Texas, have and recover costs of court from plaintiffs and that all other costs of court incurred by the parties to this action shall abide the outcome of the remanded claims, to be taxed pursuant to future proceedings in the state court.

SIGNED May _____ , 1991.

_____

JOHN McBRYDE
United States District Judge